(2)

No. 87-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BILL J. CORY,

Petitioner,

v.

STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, MARVIN R. LANG, AND ROBERT W. ZAUGG

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QUESTIONS PRESENTED

(1) Whether a civil RICO complaint under 18 U.S.C. § 1962(c) alleging that a Saving & Loan Association failed to pay one account holder a promised rate of interest on an account over a 40-month period was properly dismissed for failing to allege a "pattern of racketeering activity."

(2) Whether a civil RICO complaint under 18 U.S.C. § 1962(c) was properly dismissed when the "person" alleged to be operating an "enterprise" through a pattern of racketeering activity was also the enterprise.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

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Respondents Standard Federal Savings and Loan Association [hereinafter "Standard"], Marvin R. Lang, and Robert W. Zaugg respectfully request that this Court deny the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 31, 1988.[1]

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[1] Standard has no parent companies, subsidiaries, or affiliated corporations which are required to be listed by Rule 28.1 of the Rules of this Court.

STATEMENT OF THE CASE

Petitioner Bill J. Cory seeks review of an unpublished decision of the United States Court of Appeals for the Fourth Circuit affirming the dismissal of Cory's complaint by the United States District Court for the District of Maryland. Cory filed his *pro se* complaint in the district court on May 22, 1986 alleging that Standard, Lang, and Zaugg (who are or were officers of Standard) violated Section 1962(c) of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-65, in handling Cory's T-Bill Plus Money Market Account.[2]

The complaint alleged that Cory deposited $2500 in a T-Bill Plus Account, relying on promises that Standard would pay a certain minimum interest rate, and that Standard thereafter changed that rate without notice.[3] All defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Among other things, the defendants argued that the complaint did not allege a "pattern of racketeering activity" as defined in 18 U.S.C. § 1961(5). In response, Cory contended that the alleged underpayment of interest 36 times over a period of 40 months constituted a sufficient "pattern."

While the motion to dismiss was pending and discovery proceeding, Cory filed a motion for summary judgment.[4] Before the district court took action on that

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[2] Cory previously filed a nearly identical complaint in the United States District Court for the Eastern District of Virginia. That complaint was dismissed due to improper venue on April 18, 1986.

[3] Since Petitioner seeks review of a decision dismissing his complaint, the facts pleaded in the complaint must be accepted as true. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

[4] Petitioner conceded in the motion for summary judgment that the total interest he alleged was underpaid amounted to approximately $1,000.00. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Exh. 8 (filed Nov. 14, 1986).

motion, Cory moved to amend the complaint, although no proposed complaint was submitted. The district court referred all of the pending motions to the United States Magistrate for review and recommendation.

On May 29, 1987, the Magistrate filed a report recommending that the motion to dismiss be granted and that Cory's motion for leave to amend be denied due to his failure to either include a proposed amended complaint or describe the amendment. Pet. App. A24-A30. Cory subsequently lodged a proposed amended complaint with the Clerk of the district court.

On September 21, 1987, the district court adopted the recommendation of the Magistrate and granted the motion to dismiss. Pet. App. A8-A23. The district court held that the complaint failed to allege a "pattern of racketeering activity" sufficient to support a RICO claim. In addition, the court found that Cory had alleged both that Standard was a "person" conducting an enterprise through racketeering activity and that Standard was the enterprise, contrary to the rule of *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). Pet. App. A14-A16.[5]

Cory appealed the decision to the United States Court of Appeals for the Fourth Circuit, claiming jurisdiction under 28 U.S.C. § 1291. That court, in an unpublished decision, affirmed the dismissal of the complaint. Pet. App. A3-A5. It held:

> "The district court properly found that Cory had failed to allege a 'pattern' of racketeering activity. Even assuming Cory sufficiently alleged that the defendants constituted a [sic] 'enterprise' that perpetuated a fraudulent scheme against him, the com-

[5] The District Court also denied Cory's motion to amend the complaint. The Court found that the amendment was submitted untimely and "as the initial complaint, fails to state a cause of action." Pet. App. A6.

> plaint still 'failed to charge the kind and degree of continuous engagement in criminal conduct required to constitute a RICO "pattern."' *Eastern Publishing & Advertising Inc. v. Chesapeake Publishing & Advertising, Inc.*, 831 F.2d 488, 492 (4th Cir. 1987)." Pet. App. A4.

ARGUMENT

I. The Petition Does Not Present Any Issue Worthy of Review by this Court

Respondents recognize that the Court recently agreed to consider the question of what acts may be sufficient to constitute a "pattern of racketeering activity" under 18 U.S.C. § 1962(c). *H.J. Inc. v. Northwestern Bell Telephone Co.*, 56 U.S.L.W. 3647 (U.S. March 21, 1988) (No. 87-1252). Nonetheless, the petition should be denied because Petitioner's complaint did not allege a sufficient pattern of racketeering activity under the standard established by any of the courts of appeals.

This Court earlier urged the lower courts "to develop a meaningful concept of 'pattern.'" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985); *see also id.* at 527-28 (Powell, J., dissenting). In *Sedima*, the Court noted that while the language of § 1961(5) defining a "pattern of racketeering activity" requires a minimum of two separate acts, two acts may not be sufficient to establish a pattern. "[I]n common parlance two of anything do not generally form a 'pattern.'" *Id.* at 496 n.14. Quoting from the Senate Report on RICO, the Court pointed out that:

> "'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.'"

Id. (quoting S. Rep. No. 617, 91st Cong., 2d Sess. 158 (1969) (emphasis by the Court). The Court also noted

the statement of Representative Poff that RICO was "'not aimed at the isolated offender.'" *Id.* (quoting *Hearings on S. 30 and Related Proposals Before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess. 665 (1970)).

Following *Sedima*, the courts took a variety of approaches to formulating a more restrictive "pattern" requirement. Under any reasonable construction, however, the conduct alleged in Petitioner's complaint would not state a claim under RICO. Therefore, the petition for certiorari should be denied because the decision of the Fourth Circuit was clearly correct.

Petitioner's complaint alleged several predicate acts in furtherance of only one scheme. The complaint alleged two mailings in which Respondents promised to follow one formula in computing the interest on Petitioner's account and a series of subsequent uses of the mail to send Petitioner monthly statements of account, some of which reflected the results of interest calculated by a different formula.[6] Essentially, Petitioner charged one fraudulent act—changing the formula for calculating interest without notice.[7] The subsequent mailings were hardly inde-

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[6] As discussed in Argument II *infra*, these latter mailings cannot be viewed as mail fraud within the scope of 18 U.S.C. § 1341, and therefore should not be regarded as predicate acts. In addition, the petition for certiorari at pp. 7-8 discusses a number of additional allegations of fraudulent conduct. None of these appeared in Petitioner's complaint and they cannot be considered in determining its sufficiency. In addition, allegations that Respondents' advertising contained fraudulent material do not appear to allege either mail or wire fraud, and thus would not have constituted predicate acts for RICO purposes even had they been contained in the complaint.

[7] Standard's regulations which were appended to Petitioner's complaint reserved the right of Standard to revise or amend the regulations, which included the commitment concerning interest rates, at any time by posting a notice of the change in Standard's offices and by mailing a written notice to all account-holders. T-Bill Plus Account Rules and Regulations ¶ 11. In opposing Petitioner's

pendent acts of fraud, but merely part of the normal adjuncts of operating a savings account.

To Respondents' knowledge, no court of appeals since *Sedima* has sanctioned a civil RICO complaint where there have not been at least several independent criminal acts, as opposed to the mere repetition of a ministerial mailing charged in the instant complaint. Several courts have found that the continuity component of the pattern analysis suggested in *Sedima* requires that the plaintiff allege more than one criminal episode. *See, e.g., Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987); *Superior Oil Co. v. Fullmer*, 785 F.2d 252 (8th Cir. 1986).

Other courts have followed the Seventh Circuit in weighing several factors to determine whether a complaint alleges a pattern of racketeering activity. These factors include (i) the number and variety of predicate acts, (ii) the length of time over which they were committed, (iii) the number of victims, and (iv) the presence of separate schemes and distinct injuries. *See, e.g., Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); *see also Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3d Cir. 1987); *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349 (3d Cir. 1987). The Fourth Circuit utilizes this case-by-case analysis. *See Walk v. Baltimore & Ohio Railroad*, No. 87-3585 (4th Cir. May 31, 1988); *HMK Corp. v. Walsey*, 828 F.2d 1071 (4th Cir. 1987), *cert.*

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motion for summary judgment, Respondents submitted uncontradicted affidavits that Standard had notified all holders of T-Bill Plus accounts that the interest formula was being changed, both by including notices to that effect in the same envelope as the monthly statements and by placing notices in each Standard branch office. Respondents also submitted uncontradicted affidavits of other holders of T-Bill Plus accounts confirming that they had received the notification of the change in interest formula.

denied, 108 S. Ct. 706 (1988); *International Data Bank v. Zepkin*, 812 F.2d 149 (4th Cir. 1987).

The Ninth Circuit also imposes a flexible test for the allegation of a pattern. However, it has concluded that the required continuity is not shown if the plaintiff alleges only a single fraud on a single victim. Such single frauds are the "isolated or sporadic" activity about which the Court expressed concern in *Sedima*. *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356, 360 (9th Cir. 1988); *California Architectural Building Products v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988).

Finally, two Circuits have declined to adopt a particularized approach to the continuity component of the pattern requirement. The Second and Eleventh Circuits have focused on the number of related predicate acts as the sole requirement for establishing a pattern. *See United States v. Ianiello*, 808 F.2d 184, 189-93 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987); *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970-71 (11th Cir. 1986).[8]

Significantly, these cases have all involved allegations of several different fraudulent acts, albeit in furtherance of one scheme. For example, *Ianiello* involved a series of separate acts of skimming bar receipts, filing falsified tax returns, and filing fraudulent liquor licenses. 808 F.2d at 186-89. Similarly, in *Bank of America*, the plaintiffs alleged that the defendants prepared and dissemi-

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[8] The Second Circuit recently recognized that its cases have strayed from the strict focus on the number of predicate acts of *Ianiello* and a panel concluded that allegations of a single scheme would not be sufficient to support a RICO claim. *Beauford v. Helmsley*, 843 F.2d 103, 108-10 (2d Cir. 1988); *see, e.g., Creative Bath Products, Inc. v. Connecticut General Life Insurance Co.*, 837 F.2d 561, 564 (2d Cir. 1988).

nated a series of false financial statements. Each one constituted a different and independent act of fraud.

Under any of the tests established by the courts of appeals, the instant complaint was defective. Since only one scheme was alleged, the courts that have required allegations of multiple episodes would have rejected the complaint. Applying the Seventh Circuit's balancing analysis, Petitioner's complaint alleged only one type of predicate act, one victim, one scheme, and only one type of injury. The relevant factors overwhelmingly weigh against a finding of pattern, as the Fourth Circuit held. Since only a single fraud on a single victim was alleged in the complaint, it would also have been found defective under the Ninth Circuit's test.

Finally, the complaint also failed to pass muster even under the tests applied by the Second and Eleventh Circuits. Those courts have found the pattern requirement satisfied if there are several independent frauds committed in the furtherance of one scheme. The instant complaint, however, alleges only one act of fraud—the failure to pay interest at the promised rate. No matter how many months went by, the complaint can only be read to allege one fraudulent act. If the pattern requirement of 18 U.S.C. § 1962(c) has any meaning whatever, it must be read to exclude the sort of "garden variety" fraud involving only one type of conduct and one victim that was alleged in Petitioner's complaint. The allegations in the complaint exemplify the "isolated offender" that Congress sought to exclude from RICO.[9]

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[9] In a strikingly similar case to the one at bar, the district court in *Miller v. Moffat County State Bank*, 678 F. Supp. 247 (D. Col. 1988), concluded that no pattern had been alleged in a case in which the plaintiff claimed that a bank had systematically charged him interest on a loan that was higher than that originally agreed to. The court found that no matter how many months of interest payments had taken place, the complaint alleged only one injury—charging too much interest on one loan—and that was insufficient to establish a pattern of racketeering activity.

The petition for a writ of certiorari should therefore be denied because the Fourth Circuit properly concluded that the complaint did not allege the required pattern of racketeering activity.[10]

II. The Complaint Alleged Only Two Acts of Mail Fraud

While Petitioner (Pet. at 7-8) claims to have alleged 43 different predicate acts, the complaint in fact alleges only two acts which might come within the definition of mail fraud in 18 U.S.C. § 1341. The vast majority of the predicate acts alleged were mere routine mailings of monthly statements of the sort which this and other courts have repeatedly held cannot constitute mail fraud.[11]

Under the T-Bill Plus Account regulations which were appended to the complaint, "[s]tatements reflecting account activity, charges associated therewith, and the balance in the account shall be rendered to the depositor(s)

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[10] Since the question presented in the petition does not refer to Petitioner's submission of a proposed amended complaint, it appears that he has abandoned any arguments relating to the district court's failure to grant his motion for leave to amend. Sup. Ct. R. 21.1(a). In any event, the denial of leave to amend was entirely proper. No amendment was submitted at the time Petitioner filed his motion as required by Fed. R. Civ. P. 15(a). Further, when the proposed amendment was submitted, it continued to allege only the single underlying scheme described in the initial complaint. The district court thus correctly ruled that the amendment also failed to state a cause of action.

[11] Plaintiff also alleged that certain of Respondent Standard's advertisements were deceptive. The complaint did not allege that the placing of these advertisments involvd the use of interstate mail or wire communications. Therefore, they cannot be considered predicate acts for RICO purposes. Plaintiff in the petition (but not in the complaint) also appears to claim that Respondents' alleged failure to respond to an inquiry concerning the interest rate on his account is another predicate act. Of course, not using the mails cannot be construed as mail fraud under 18 U.S.C. § 1341.

at least on a monthly basis at Standard's convenience." T-Bill Plus Account Rules and Regulations ¶ 5. Thus, the mailings which Petitioner claims as predicate acts of fraud were routine statements which Respondents were legally obligated to send.[12]

In *Parr v. United States*, 363 U.S. 370 (1960), the Court held that legally compelled mailings of lawful financial documents were not mailed for the purpose of executing a fraudulent scheme within the scope of the mail fraud statute, even though the mailers were at the same time engaged in fraud. Like the mailings in *Parr*, the monthly statements sent to Petitioner were legally required, intrinsically innocent, and the complaint contains no allegation that they were anything but accurate. Assuming that the complaint validly charges the existence of a scheme to defraud, the mailing of the monthly statements was not part of the fraudulent scheme. *See United States v. Tarnopoul*, 561 F.2d 466, 472 (3d Cir. 1977) (applying rule in *Parr* to mailings "regularly employed to carry out a necessary or convenient procedure of a legitimate business enterprise"); *but see United States v. Bernhardt*, 840 F.2d 1441, 1446-47 (9th Cir. 1988).

Since under *Parr* the mailing of the monthly statements cannot be viewed as mail fraud, the only acts of mail or wire fraud alleged in the complaint were the mailing of two documents to Petitioner. Since *Sedima*, the courts have uniformly concluded that the mere allegation of two related predicate acts over a short period of time does not satisfy the pattern requirement. The complaint was therefore defective on its face and this case does not warrant review by this Court.

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[12] Notably, nothing in the account regulations gave any indication that the monthly statements would include the various interest rates applicable to the account during the previous period.

III. The Complaint Also Failed To Allege the Existence of an Enterprise

Even if the complaint had alleged a pattern of racketeering activity, it would still be subject to dismissal since it improperly cast Standard as both the enterprise and as a person conducting the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c), the section on which Petitioner appears to rely, prohibits the conduct of the activities of an enterprise through a pattern of racketeering activity. In construing this section, the courts have concluded that the enterprise whose activities are affected may not also be the person alleged to be conducting the enterprise.

> "We conclude that 'enterprise' was meant to refer to a being separate from, not the same as or part of, the person whose behavior the act was designed to prohibit . . . . [W]e would not take seriously . . . an assertion that a defendant conspired with his right arm, which held, aimed and fired the fatal weapon."

United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *see Bennett v. U.S. Trust Co.*, 770 F.2d 308 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

Petitioner alleged in the complaint both that Standard was the enterprise and one of the persons conducting its own affairs through a pattern of racketeering activity. "Standard *is an enterprise that conducted its affairs* through a pattern of racketeering activity. . . ." Complaint ¶ II(1) (emphasis added).

The district court found as an alternative ground that the complaint should be dismissed for failing to identify an enterprise separate from the alleged racket-

eering activity. Since Petitioner clearly identified Standard both as the enterprise and as one of the persons conducting that enterprise, it was entirely proper to dismiss the complaint.

The petition for certiorari should therefore be denied because even if the Court should determine that the complaint properly alleged a pattern of racketeering, the complaint would remain defective for its failure to allege the existence of an enterprise separate from the persons allegedly engaged in racketeering acts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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